

December 16, 1949

Perle McBride, Safety Inspector
Arizona Corporation Commission
The Capitol
Phoenix, Arizona

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ARIZONA ATTORNEY GENERAL

Dear Mr. McBride:

We have had an opportunity to study the matter of the operation of the Apache Railway under its contract with the Southwest Lumber Company for the hauling of logs from Maverick to McNary. After extensive correspondence and conferences with Mr. McQuatters, attorney for both companies, we have concluded that the operation of the Apache Railway Company between McNary and Maverick is subject to Sections 69-121 and 69-122 ACA 1939, known as the "Full Crew" Train Law.

Section 69-121 reads as follows:

"Train crews--Failure to use full crews--Penalty.--A single locomotive, or a single locomotive with its accompanying tender, when operated outside of the yard limits, shall be equipped with, and shall carry, a crew consisting of not less than one (1) engineer, one (1) fireman, and one (1) conductor or flagman; provided, however, that this section shall not apply to helper locomotives going or returning a distance of twenty-five (25) miles.

A passenger, mail, or express train, composed of less than six (6) cars, when operated outside of the yard limits shall be equipped with, and shall carry, a crew consisting of not less than one (1) engineer, one (1) fireman, one (1) conductor, one (1) baggage-master, and one (1) flagman; provided, however, that this

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section shall not apply to gasoline motor cars.

A passenger, mail, or express train composed of six (6) or more cars, when operated outside of the yard limits, shall be equipped with, and shall carry, a crew consisting of not less than one (1) engineer, one (1) fireman, one (1) conductor, one (1) baggage-master, one (1) flagman, and one (1) brakeman.

A freight train composed of less than forty (40) cars, when operated outside of the yard limits, shall be equipped with, and shall carry, a crew consisting of not less than one (1) engineer, one (1) fireman, one (1) conductor, one (1) flagman, and one (1) brakeman.

A freight train composed of forty (40) or more cars, when operated outside of the yard limits, shall be equipped with, and shall carry, a crew consisting of not less than one (1) engineer, one (1) fireman, one (1) conductor, one (1) flagman, and two (2) brakemen.

All local freight trains, doing any switching, or unloading any freight of whatever nature, shall be equipped with, and shall carry, a crew consisting of six (6) persons, to-wit: One (1) conductor, one (1) engineer, one (1) fireman, two (2) brakemen, and one (1) flagman.

All trains other than those described in the preceding portions of this act, when operated outside of the yard limits, shall be equipped with, and shall carry, a crew consisting of not less than one (1)

engineer, one (1) fireman, one (1) conductor, one (1) flagman, and one (1) brakeman.

That all flagmen mentioned in the preceding sections shall have had at least one (1) year's experience as brakemen.

All engines used in switching or placing cars within the limits of any railroad yard shall be equipped with and shall carry a crew of not less than one (1) engineer and one (1) firemen."

Section 69-122 reads as follows:

"Penalty for violation of Full Crew Act.--That from and after the taking effect of this act, it shall be unlawful for any railroad company, or for the receiver of any such company, to run upon or over any line of railroad, or any part thereof, within the state of Arizona, any train locomotive, or engine, which is not equipped with, or does not carry for use in its operation, a full crew as herein fixed and prescribed; and each and every railroad company or receiver that, after the taking effect of this act, shall run upon or over any line of railroad or any part thereof, within the state of Arizona, any train, locomotive, or engine, which is not equipped with, or does not carry, for use in its operation a full crew as herein fixed and prescribed, shall be liable to the state of Arizona for a penalty of not less than one hundred dollars (\$100.00) for every such offense.

All suits for penalties under this act shall be brought and prosecuted to judgment in the name of the state of

"Arizona, as plaintiff, in a court of competent jurisdiction in the county of Maricopa, or in any county in said state into or through which the defendant's line of railroad may be operated; and such suits shall be brought and prosecuted by the attorney-general, or under his direction, or by the county attorney of such county."

The company has contended, both by its attorney and through the general counsel for the American Short Line Railroad Association (Mr. C. A. Miller), that Section 69-207 ACA 1939 exempts the Apache Railway from the provisions of the "Full Crew" Train Law while operating on the McNary to Maverick line. This section of the line was constructed and is owned by the Southwest Lumber Company, and it was formerly operated as an industrial railroad by the Southwest Lumber Company. However, a year or more ago Southwest Lumber Company entered into a contract with the Apache Railway under a trackage right agreement to provide crews and motive power to haul logs from the woods to the mill at certain prescribed rates. It is claimed that in this operation they are acting not as a common carrier but as an industrial railroad.

We believe a careful reading of Section 69-207, supra, cannot support the company's contention.

"Any industrial railroad, owned and operated in connection with and as a part of the operating equipment of an industry in this state, and which is not incorporated as, nor held out to be a common carrier, and which does not come into competition with a common carrier railroad, shall have the right to transport the property of others, either free or under private agreement for compensation, and such railroad shall not by reason thereof be held or construed to be a common carrier."

The Apache Railway is, in its operation from Holbrook to McNary a common carrier; it was incorporated as a common carrier and it holds itself out as a common carrier. The Apache equipment used on the Maverick run is part of the equipment used as a common carrier, and the track is, in effect, under lease to the Apache Railway. In this operation the Apache Railway is carrying for hire cattle, sheep, aspen poles and certain other types of freight from various points on the Maverick line through McNary to points connecting with other railroads beyond Holbrook. Thus, it cannot be said that this is an industrial railroad owned and operated in connection with and as a part of the operating equipment of an industry.

It is our belief that Section 69-207, supra, was designed to cover only the operations of a true industrial railroad and not meant to include the operations of the equipment of a common carrier over a private roadbed owned by an industry which is under lease to that common carrier. It is therefore our conclusion that the Apache Railway is not included under Section 69-207, supra, in its operations from McNary to Maverick.

It is also the contention of Mr. McQuatters and Mr. Miller that the "Full Crew" Train Law, Sections 69-121 and 69-122, supra, apply only to common carriers and that even if Apache Railway could not be described as an industrial railroad it cannot be required to have a full train crew if it is a contract carrier and not a common carrier. Section 69-122, supra, does not require that a railroad company be a common carrier to be included in the "Full Crew" Train Law. It states throughout: " * * * shall be unlawful for any railroad company * * * each and every railroad company, etc." This act was passed in 1912 along with several other sections of an Act dealing with railroad companies, and nowhere in the Act does it define railroad companies as common carriers.

"A 'railroad company' in ordinary usage, is a company which is principally engaged in operating a railroad." Crowley v. Polleys Lumber Co. (Mont.) 9 P.2d 1068.

The term is not defined in the statutes passed by the legislature in 1912.

We are of the opinion that it is immaterial whether the Apache is operating as a common or contract carrier over the "Maverick line. It is nevertheless subject to the "Full Crew" Train Law since it is not an industrial railroad and is a company "which is principally engaged in the operation of a railroad" and, therefore, a railroad company within the meaning of Sections 69-121 and 69-122, supra.

The distinction between a railroad company and an industrial railroad is well stated in Luster v. Geneva Mill Co., (Fla.) 135 So. 854, 855:

"A corporation or company engaged in the operation of a sawmill and operating as an incident to such business an ordinary log road or tram road solely for the purpose of transporting logs from the forest to the mill, is not a 'railroad company' within the provisions of sections 4964, 4965, and 4966, Revised General Statutes of 1920, * * * "

The Court stated further:

"where a corporation or company engaged in the operation of a sawmill and as an incident operates a log or tram road and in addition thereto, does the business of a railroad company, it was 'railroad company' within the statute even though the name of the company and its primary business indicates that of a lumber or milling company."

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In summary, it is our opinion that the operation of the Apache Railway on the Maverick line must comply with the "Full Crew" Train Law or be in violation of Section 69-122, supra.

Yours very truly,

FRED O. WILSON
Attorney General

JOSEPH P. RALSTON
Assistant Attorney General

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